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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 170

FREDERICK WEISER,

Petitioner,

—v—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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October Term, 1969

No.

FREDERICK WEISER,

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—v—

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Frederick Weiser, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming Petitioner's convictions for conspiring to bribe a fellow Internal revenue agent (Count 1), 18 U.S.C. §371; bribing said fellow revenue agent (Count 2), 18 U.S.C. §201 (b); aiding and abetting three other agents to bribe said fellow agent (Counts 4, 5, and 6), 18 U.S.C. §201(b); and of failing to report violations of the revenue laws which he knew other agents were committing (Counts 10, 11 and 12), 26 U.S.C. §7214(a)(8).*

Petitioner was sentenced to concurrent terms of 18 months imprisonment on each count, but is at liberty on his own recognizance by virtue of an order of the Court below granting a stay of mandate and continuing his liberty pending certiorari. (App. 13a)

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* Petitioner was acquitted on four counts (3, 7, 8, and 9) which also charged on each bribe transaction the payment of a "gratuity", 18 U.S.C.S. 201(f).

Opinion Below

The opinion below, not yet officially reported, is reprinted in the appendix (App. 1-11a).*

Jurisdiction

The United States Court of Appeals for the Second Circuit affirmed the judgment of conviction of the United States District Court for the Southern District of New York on the 13th of November, 1969. A timely Petition for rehearing and motion in the alternative for stay of mandate was filed, but the rehearing was denied on December 10, 1969 although a stay of mandate was granted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1—Whether as a matter of law the Petitioner, an I.R.S. agent for 17 years, was entrapped by a "false friend" and fellow agent who told him he was being investigated and for a small token offered to tell him why. The investigation was largely fabricated and Weiser was charged with "bribery" after being induced to pay this "token" for the information.

2—Whether Petitioner's rights under the Fifth and Sixth Amendments were violated by the introduction during the Government's case of certain tape recordings of fellow agents, over objection, who never testified but gave in-

* Unless otherwise indicated, references in parentheses are distinguished as follows: to the Apprendix of this Petition by "App."; to the Appendix in the Court Below by "A"; and to the Court reporter's minutes of trial, "S.M."

criminatory "evidence". (*Bruton* v. *United States,* 391 U.S. 123 (1968)). No possibility of confrontation or cross-examination existed and only one of the four such agents recorded was even named as a co-conspirator.

3—Whether the clandestine recording and transmitting of Petitioner's conversation with a fellow agent (Wenig) posing as a "false friend", which recordings were read in evidence at trial, violated Petitioner's rights under the Fourth, Fifth and Sixth Amendments (*Katz* v. *United States,* 389 U.S. 347 (1967) and *United States* v. *White,* 405 F.2d 848 (7th Cir.), Cert. Granted 394 U.S. 957 (1969)).

White v. *United States is in conflict with United States* v. *Kaufer,* 387 F.2d 17, 19 (2d Cir. 1967); 406 F.2d 550 (2d Cir. 1969).

4—Whether Petitioner's rights under the Fifth Amendment were violated by the trial court's order that he submit to a mental examination by a psychiatrist employed by the Government for the purpose of affording that adversary's psychiatrist a basis to dispute Weiser's claim and his psychiatrist's testimony that he was suffering from a mental condition at the time the crime was allegedly committed which precluded him from refraining from alleviating his anxieties and therefore paying Wenig to tell him why he was under investigation.

The investigation was apparently based upon a desire to "test the will-power" of the I.R.S. agents and no substantive underlying charges were ever brought against Weiser.

5—Whether Petitioner was denied a fair trial by virtue of the prosecutor's drawing an analogy between Weiser

and former New York City Water Commissioner James Marcus and another corrupt official, both then being well publicized in the local press.

6—Whether Petitioner could be convicted of the three counts under 26 U.S.C. 7214 (failing to report acceptance of bribes or gratuities by other agents) since such a report would necessarily have been self-incriminatory (*Marchetti* v. *United States*, 390 U.S. 39 and *Leary* v. *United States*, 395 U.S. 6).

The statute itself would appear to be unconstitutional in that it requires such self-incriminatory reports to be made and imposes criminal sanctions if not reported. (First and Fifth Amendments.)

7—Was it proper for the trial court to charge that a conspiracy existed among Agents Kurman, Kramer, Viviano, Romanoff and Weiser, despite the fact that the Grand Jury only charged a conspiracy with Romanoff. Such ruling permitted the Government to introduce evidence which otherwise would have been clearly improper. Did this preclude a fair trial?

8—Whether Petitioner's rights to confrontation under the Sixth Amendment were traduced by the trial court's refusal to permit Weiser to learn the identities of the informers who were substantially responsible for the initiation of the investigations in the first instance.

Constitutional and Statutory Provisions Involved

The Fourth, Fifth, Sixth and First Amendments of the Constitution are herein involved as well as pertinent portions of 18 U.S.C. §§ 371; 201(b), and 201(f) as well as 26 U.S.C. § 7214(a)(8).

Summary Review of the Facts

Petitioner is an Internal Revenue agent as well as a Certified Public Accountant. He has been an agent for almost 18 years. He had suffered several crushing personal setbacks, including the sickness and ultimate death of his mother with whom he was very close; the miscarriage of his wife; and infection of his daughter's leg wherein a malignancy was suspected; and his father's later illness and ultimate death.

A fellow agent, Romanoff, according to Weiser's testimony which was uncontradicted except by hearsay recorded conversations with fellow agent Harold Wenig who was feigning the role of a dishonest agent, set up an interview and meeting with Wenig after telling Weiser that Appellant was under investigation and that Wenig could help him.

There is a serious question whether there was a good-faith investigation in progress at the time or whether the revenue service decided to place temptation in the way of its agents on a hit and miss basis and see if they "bit".

In this context, Weiser was cajoled into paying Wenig a total of about $150 dollars for information concerning this alleged investigation. In the course of this plan of what Petitioner maintains was premeditated "entrapment" as a matter of law, all of the conversations allegedly held privately with Wenig were in fact broadcast and recorded with the aid of another agent in a vehicle some distance away.

No Court orders were ever obtained for this clandestine eavesdropping and secret recordings.

Weiser at about the same time of his first meeting with Wenig—well before his indictment herein, started to visit a psychiatrist for *treatment* in connection with his extreme anxieties and personal problems.

Weiser was *never charged with any underlying impropriety* in connection with his work as an agent so it seems clear that the alleged "investigation" must have been made of the whole cloth or was woven of such threadbare fabric that it lacked essential substance.*

Wenig also convinced Weiser that other agents were under investigation and that only he could help them, and Weiser naively enticed several others to visit and become entrapped by Wenig.

These other agents included agents Kramer, Kurman and Viviano. The government, over objection, was permitted to play not only recorded conversations between Weiser and Wenig, but also between Kramer, Kurman, Viviano and Romanoff wherein petitioner was not present. The latter quartet did not take the stand.

The indictment only charged a conspiracy with agent Romanoff and not with Kurman, Kramer or Viviano.

In the course of trial, Weiser sought to introduce psychiatric testimony from the psychiatrist who had been treating him. The Court did *not* appoint an impartial psychiatrist, but rather directed, over objection, that the petitioner submit to psychiatric examination by a psychiatrist hired by and paid for by the government, which was and is his adversary.

Certain prejudicial remarks made in summation, including the drawing of an analogy to Commissioner Marcus is also cited as plain error as a matter of law precluding a fair trial.

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* The I.R.S. in fact gave Weisek a letter of clearance.

POINT I

The Petitioner herein was an I.R.S. agent who was entrapped by a clandestine recorder and transmitter employed by a fellow agent, Harold Wenig, who pretended to be a friend and falsely led Weiser to believe he was the target of an investigation which was largely fabricated. Hoodwinked by these insidious insinuations, Weiser was convinced to "pay" Wenig about $150 for information about this alleged investigation which never culminated in any charges.

Petitioner, who had serious emotional and psychiatric problems was indicted, not for any misconduct as regards the performance of his duties as an I.R.S. agent, but only on account of the "bribe" he was tricked into paying for useless information.

It is submitted that the case at bar should shock the conscience of the Court.

Petitioner, Frederick Weiser, was an I.R.S. agent for almost 18 years and there has still never been any charge that his performance in that capacity was unsatisfactory or improper. As a matter of fact, he had been commended for his work.

What makes this case such a gross violation of due process and fair play, is that the Treasury Department decided to "test" some of its agents by placing temptation in their paths. To accomplish this, they utilized the services of an agent, Harold Wenig, who pretended to be a less than honest agent. He in turn utilized a "judas goat", Sidney Romanoff, another agent, who allegedly was already involved in an impropriety and therefore was used to entrap Weiser (and presumably others).

As this Court noted in *Spano* v. *New York*, 360 U.S. 315 (1960),

> "Petitioner was apparently unaware of John Gay's famous couplet:
>
> 'An open foe may prove a curse
> But a pretended friend is worse,'
>
> and he yielded to his false friend's entreaties" (id. at 323).

Wenig admitted giving 12 agents names to Romanoff (404A). In one of the tapes, Romanoff asked, "*Who am I going to hang?*" (414A).* Again Romanoff said to Wenig, "I got you another one lined up, and I will get you Lerner. I will get you Ralph" (417A).

Wenig testified that he "merely" mentioned names and Romanoff did the rest (417-22A). Wenig also admitted that he gave instructions to Romanoff (436A).

On a government exhibit the name "Weiser" appeared along with another name, Sinott which Romanoff wrote on a card. Then Wenig admitted that it was *he who wrote the name "Weiser" and not Romanoff* (464A).

There was a tape of the conversation with Romanoff wherein allegedly Romanoff gave Wenig the name Weiser and not vice versa. But the portion where Romanoff mentioned "Weiser" was conveniently or fortuitously "inaudible" (465A).

Mr. Kove:

> "Q. Will you tell us whether or not the conversation in which Mr. Romanoff mentioned Weiser's name is part of the audible or inaudible?

---

* Figures in parentheses refer to pages of the Appellant's Appendix in the Court below, unless otherwise indicated.

"A. (Wenig): *I believe that's part of the inaudible.*"

Romanoff had told Weiser that he would be expected to give Wenig $100 for the information that he had. At the meeting with Wenig, Weiser gave him five $20 bills (Gov't Exh. 3-A, 21-22A). Unknown to Weiser, and sans any cautionary warnings, the undercover agent, Wenig, proceeded to hand him a line of fabricated tales to hoodwink Weiser.

There followed several other meetings with Weiser and Wenig even supplied him with alleged interview forms that would be used when Weiser was called down to the chief inspector's office (16, 17A). Wenig testied further that he tried to wrest information from defendant about other agents, Kitses, Arbeitman, Kramer, Kurman and Viviano (84-87A; 105-7A; 109-115A).

At all of these meetings, unbeknown to Weiser, electronic surveillance devices were in use and in addition, they were photographically observed by another inspector, Reisman (113-133A).

Wenig supplied the conversations with Weiser over objection and it appeared that Wenig told Weiser that Arbeitman had "*dug his own grave*" by going to an interview with the inspectors without being prepared. (This clearly shows the desire to entrap 107A).

There was an objection to the playing of the tapes, that is the reading of the transcripts of the tapes (they apparently were not played for the jury), as parts were inaudible and the custody of them were placed in issue (133-134A). The prosecutor rejoined that the "*defendant*"

can testify if he chose to explain certain things—this was of course improper as no defendant in a criminal case is "required" to prove his innocence and never is obliged to testify. Thus the prosecutor asserted (135A):

> *Mr. Wing:*
>
> ". . . I am sure your Honor has had far greater experience with tape recordings than I have had, but I see no reason why the fact that some portions *are inaudible* makes other portions inadmissible. *If Mr. Weiser or anybody who was present can testify about the inaudible portions, they are not prevented from so doing.* (Emphasis supplied)

The defense then made it even more abundantly clear that the defendant was not duty bound to testify or call anyone in his defense as was suggested by the U. S. Attorney (136-7A):

> Mr. Kove: "The defendant is under no obligation to ferret out the whys and wherefores or the inaudible areas. We are entitled to know everything that took place, at the very least."

The Court below did not even attempt to distinguish or reconcile the dichotomy of interpretation between the cases of *United States* v. *White,* 405 F.2d 848 (7th Cir. 1969), Cert. Granted, 394 U.S. 957 (1969) and *United States* v. *Kaufer,* 387 F.2d 17 (2d Cir. 1967). The *White* case is in apparent conflict with the Second Circuit's case of *United States* v. *Kaufer, supra.* So far as is known, *White* is now *sub judice* with this Court.

The use of a surreptitious listening and broadcasting device without court authorization was clearly a violation of the Petitioner's rights. To argue that Wenig "consented"

is no answer since *Katz* v. *United States,* 389 U.S. 347 (1967) noted that it is the protection of "People" *not places* that lies at the base of the Fourth Amendment. In *Katz,* for example, it would not have been any defense for the government to claim that the person whom Katz was calling consented to the implantation of the listening device.

In *Osborn* v. *United States,* 385 U.S. 323 (1966) while there was monitoring with the consent of the informer, there was also proper *judicial* approval of the reasonableness thereof. In the 7th Circuit's opinion in *White,* the Court noted:

> "It is especially important that the Court in Katz referred with approval to Osborn v. United States, 385 U.S. 323 (1966), where the essentiality of prior authorization was emphasized. . . . Osborn teaches what the agents in the instant case should have done, but failed to do, namely, *obtain a warrant* authorizing the use of electronic surveillance devices . . ." (emphasis supplied).

In *Lee* v. *Florida,* 392 U.S. 378, the Supreme Court recently condemned and barred the use of evidence obtained by wiretap without a lawful order. The surveillance herein was in direct derogation of the recent Crime Control Act and although it was performed before that act was effective, the evidence was used thereafter. Moreover, *Lopez* v. *United States,* 373 U.S. 427, which is distinguished in *White* v. *United States, supra,* could not be deemed to embrace a situation where the recording is clearly to help entrap another agent.

In *White, supra,* the Seventh Circuit cogently notes that one party ought not be permitted to waive the Fourth Amendment rights of another (405 F. 2d at 851):

> "To claim, as the Government does, that one party can waive the Fourth Amendment rights of another is the same thing as saying that Katz would have been decided differently if the recipient of the intercepted phone call had consented to the Government's bugging. We are unable to believe that such a meaningless form of consent would have rendered the defendant's overheard statements anymore admissible in Katz . . .
>
> "The content of the defendant's private conversations intercepted by the government's clandestine activity and without prior judicial control, must be held as *per se inadmissible evidence* if the language of Katz is literally applied . . ." (Emphasis ours).

Certainly a government undercover agent could not authorize a search of a suspect's private papers without judicial warrants justifying such action. This in essence is the same thing as occurred in the instant case.

What makes it worse is that there are not even complete recordings—inferences go unverified. In addition, the government read conversations with persons other than Romanoff (an alleged co-conspirator) and Weiser. This certainly could not be justified on any theory of waiver. It was not even binding on Weiser and was objected to.

Lest there be any confusion about Wenig's intent to entrap, one need only look at the record, especially relative to the fellow IRS agent, Arbeitman whom Wenig was anxious to place in the same position as he had Romanoff and Weiser, certainly Weiser.

When told by Weiser that Arbeitman had gone to the Chief Inspector's office about an alleged investigation without having "bought" the questions in advance from Wenig,

Wenig said *"he dug his own grave"* (107 A). This is not the remark of an agent who is disinterested in whether or not he is approached for a bribe or confidential information. On the contrary, it is clear that the *sole* function of Wenig was to entrap personnel of the Service otherwise he would have been non-committal about Arbeitman's not approaching him. (see: *Williams* v. *United States,* 311 F.2d 441 (5 Cir. 1962).

See:

Sorrels v. *United States,* 287 U.S. 435 (1932);
Sherman v. *United States,* 356 U.S. 369.

POINT II

The three counts of failing to report the acceptance of bribes or gratuities by fellow-agents (26 U.S.C. §7214) is unconstitutional, especially as applied herein, since it would require incriminatory information that could well incriminate the reporter petitioner herein. No immunity from prosecution is provided by the statute and is in conflict with the Fifth Amendment.

The statute under which Weiser was charged and convicted of failing to "report" the acceptance of bribes or gratuities by fellow agents is clearly in conflict with the Fifth Amendment. (26 U.S. C. § 7214).

The Court below was struck with the problem posed, but largely because of the fact that Weiser received concurrent punishment, (*Benton* v. *Maryland,* 395 U.S. 784 (1969) it did not really pass upon the issue. District Judge Cooper himself raised the issue as well. (Slip Opinion, *United States* v. *Weiser,* 489).

The fact of unconstitutionality, however, is a matter that goes to jurisdiction and as such there should be no waiver problem. To argue that Weiser could not have incriminated himself since he was asked to tell about "others" is just not consistent with the facts. Weiser was involved herein, according to the prosecution and the Court below, on a theory of "conspiracy". Thus he would have been clearly tying a noose around his own neck by such divulgence.

The problem has been noted in *Leary* v. *United States,* 395 U.S. 6 (1969); *Marchetti* v. *United States,* 390 U.S. 39 (1968) and *United States* v. *McCarthy,* 298 F. Supp. 561 (S.D.N.Y. 1969). The Court below said, *inter alia,* "We do not believe that they require striking down a statute which does not require a report of the agent's own derelictions, but only those of others." (Slip opin. 489).

This "logic" is difficult to follow, particularly since it is contrary to the law of "conspiracy" and is anathema to the democratic precepts of the First Amendment, namely, requiring a person to speak when he chooses not to. This is the fabric of dictatorship.

Moreover, to say that it could not have prejudiced the defendant-petitioner is not capable of proof. The possibility of prejudice alone is sufficient.

Thus, it is submitted that the jury might well have been impressed with the fact that Weiser failed to report known derelictions by other agents, and this could have been the crucial factor leading to conviction on all counts.

This Court should review this Statute and declare it in conflict with the Fifth Amendment.

Since the Statute, 26 U.S.C. § 7214, appears to be in conflict with the Fifth and First Amendments, the Federal Courts are and were without "jurisdiction" to even entertain the charges concerning that law. *(The Mayor* v. *Cooper,* 6 *Wall.* 247, 252 (1868); *Cary* v. *Curtis,* 3 How. 236 (1845); *Shelden* v. *Sill,* 8 How. 441 (1850); and cf. *Martin* v. *Hunter's Lessee,* 1 Wheat. 304 (1816)).

While the case at bar may not be on all fours with the foregoing, the principle is clear that if the statute is in derogation of the Constitution, it cannot stand. The Supremacy Clause would likewise require that the Constitutional rights of an individual supersede those prohibitions of any contradictory statute (Article VI, U.S.Const.; *Lee* v. *Florida. supra).*

Due process is not a static constitutional concept, but is dynamic, and what is or is not due process is a matter for this court to determine in the light of shifting and changing circumstances *(Weems* v. *United States,* 217 U.S. 349, 373 (1910).

POINT III

There was another egregious violation of the fifth amendment rights of petitioner when over objection the court compelled him to submit to an examination by a psychiatrist hired by his adversary, so that this psychiatrist could later testify against Weiser, which actually occurred, to his prejudice. There was no issue of Weiser's ability to stand trial and the psychiatrist, Dr. Abrahamsen, was not court appointed.

The Petitioner had been seeing a psychiatrist for "treatment" long before he was indicted. This doctor, Einhorn, testified that Weiser was unable to cope with

stress situations at the time of the alleged bribe to Wenig because of serious emotional problems, including the death of his mother; the miscarriage of his wife; the possible cancer in his child's leg, and so forth.

Weiser did not want to submit to an examination by the doctor hired by the government to destroy his defense of mental illness or irresistible impulse. The district Court ordered that he submit however and the subsequent testimony of this adversary physician was virulent. It clearly violated Weiser's rights against self-incrimination and in essence compelled him to take the stand to rebut it. (See, *Leary* v. *United States, supra; Marchetti* v. *United States, supra,* etc.).

The Court below ruled that a defendant may not raise any issue of insanity without, *ipso facto,* subjecting himself to mental examination by the government's own psychiatrist. (Slip opinion, page 485). Citing its own ruling in *United States* v. *Baird,* 414 F.2d 700, 710 (2d Cir. 1969) the Court below held that the Court had power to order a mental examination by an adversary physician to "ensure fundamental fairness" and under the power of the Court to "supervise the administration of criminal justice".

In essence, therefore, the "presumption of innocence" was emasculated since the defendant was obliged to help the Government prove his "guilt".

This same reasoning could apply to an "alibi" defense or any other.

This Court should declare this to be in contravention of the Petitioner's rights against self-incrimination and reverse the conviction.

It should be noted, that unlike the "Baird case", where the defense of insanity was apparently concocted after the indictment and there was no "treatment" involved, in the case at bar Weiser was seeing Dr. Einhorn for "treatment", before the indictment.

POINT IV

The petitioner was prejudiced by the analogy of the government in summation between the case at bar and that of Commissioner Marcus and another official whose bribery charges were then being widely publicized in the mass media.

Weiser was also deprived of a sixth amendment right of confrontation by the district court's refusal to permit him to learn the names of witnesses who instigated the investigation. Petitioner could not therefore properly establish his defense of entrapment.

In summation, the Government made a reference to the much publicized bribery charges against Commissioner Marcus and another official and analogized these situations to Petitioner. There was an objection and motion for mistrial made, but the Court denied both with only a weak statement to the veniremen. No curative instruction was given however. (736 A): [Government's Summation]:

> ". . . So you don't have *scandals,* so you don't have a *water commissioner* who is arrested for taking bribes, so you don't have sanitation men out in Queens who are paid off to clean someone's streets and not other streets, in order to have a decent system and a fair system and a good government. There is a reason for those things."

This occurred just a moment before the government concluded its summation. Almost immediately thereafter, though not instantly, Mr. Kove, defense counsel asked for a mistrial and objected. (739 A, 740 A): Mr. Kove:

> "Worse of all, I think the unnecessary, improper, illegal reference to the water commissioner, Mr. Wing referring to former Commissioner Marcus, a case which had great headlines in the city for a long time, involving a situation which has absolutely no relationship to this case whatsoever, in no shape, form or manner. It could only be designed for the purpose of inciting the jury, being inflammatory.
>
> "Likewise, there was his reference to a very recent front page story of yesterday, I believe, about some garbageman in Queens taking a bribe.*
>
> "Under those circumstances I respectfully submit that this case is now so polluted, your Honor, that this jury cannot give this defendant a fair trial."

The defense sought to determine the identity of certain witnesses who had possibly instigated the investigation, in line with the defense of "entrapment".

In the case at bar, it was of course necessary to show that an agent of the government entrapped Weiser, directly or indirectly, since if the instigator is not an agent of the government the defense of entrapment is inapplicable. *United States* v. *Comi,* 336 F.2d 856 (4th Cir. 1964), cert. denied 379 U.S. 992. But a person need not be one receiving a salary to be deemed a government agent. *Sherman* v. *United States, supra,* 356 U.S. at 373-375; *Butts* v. *United States,* 273 Fed. 35 (8 Cir. 1921); 73 Harv. L. Rev. 1333 (Entrapment) at

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* The prosecutor was even "sorry" since *there was a sanitation man on the jury* and such a reference may well have impelled him to bend over backwards to "exonerate" himself by convicting Weiser. (743A)

1340, 1341 (1960). See, also, *Massiah* v. *United States,* 377 U.S. 201 (1964).

One of the most serious of a number of prejudicial errors committed by the Court below and the prosecutor was *the Court's refusal to permit the defense to elicit the names of persons who initiated the investigation of Wenig and who made the original introductions and contacts.*

It is important to note that defense counsel carefully and fully protected the record by appropriate objections and motions (371-374 A).

There was no cogent reason advanced as to why the names were withheld. Only the names were being sought since the defense never got to the point where he could ask for addresses. At any rate, since it was necessary to show that "government agents" initiated the chain of events leading to the commission of the crime, the defense was frustrated in not being able to do this at all. (*United States* v. *DeAlesandro, supra,* 361 F.2d 694 (2 Cir. 1966); *United States* v. *Comi, supra;* and *Sherman* v. *United States, supra.* See, too. *Butts* v. *United States, supra.*

In *Smith* v. *Illinois,* 390 U.S. 129, 132, the Supreme Court restated:

> "In *Alford* v. *United States,* 282 U.S. 267, this Court almost 40 years ago *unanimously reversed* a Federal conviction because the trial judge had sustained objections to questions by the defense counsel seeking to elicit 'the place of residence' of a prosecution witness . . ." (Italics ours)

In *Smith, supra, id.* at 131, the Court also noted:

> "The witnesses' [names] . . . address opened countless avenues of in-court and out-of-court investiga-

> tion. To forbid this most rudimentary inquiry as a threshold is *effectively to emasculate the right of cross-examination itself.*" (Emphasis ours.)

The Sixth Amendment guarantees not only a right to be "confronted with the witnesses against him", but also "to have compulsory process for obtaining witnesses in his favor". Both of these guarantees were denied when the names of these witnesses were withheld. (*Brady* v. *Maryland,* 373 U.S. 83.)

POINT V

The petitioner was indicted alleging a conspiracy only with agent Romanoff. Yet, over objection, the court permitted the government tc introduce the statements of *non*-testifying agents who were not even alleged to be co-defendants or co-conspirators. This was a clear violation of the principle of *Bruton* v. *United States,* 391 U.S. 123.

The indictment herein did allege a conspiracy with agent Romanoff, but not with agents Viviano, Kurman, or Kramer. Yet although none of these agents testified at the trial, and therefore could not be "confronted", the District Judge permitted the Government to read tape recorded transcripts of incriminatory statements by these agents despite an obvious conflict with *Bruton* v. *United States, supra* and *Roberts* v. *Russell,* 392 U.S. 293 (1968).

The Court below cited *United States* v. *Granello,* 365 F.2d 990, 995 (2d Cir. 1966), cert. denied, 386 U.S. 1019 (1967), three Justices dissenting, for the proposition that a conspiracy can be proved without a conspiracy charge. But in *Granello,* the co-defendant Levine and he had originally been

charged with a conspiracy, and were in fact co-defendants at trial. Moreover, no incriminating statements of each other were used.

Here the Courts below condoned a clear violation of the Sixth Amendment right of cross-examination and confrontation. No conspiracy was proved at trial so far as the other agents, Viviano, Kramer and Kurman were concerned. They may have been engaged in a separate conspiracy with Romanoff, or none at all.

That technical rules of evidence must be adhered to, especially in *conspiracy* cases, has been voiced again and again. Even non-conspiracy cases require such adherence, of course, but a conspiracy charge permits the introduction of evidence which in many cases would be inadmissible.

In *Krulewitch* v. *United States,* 336 U.S. 440, (1949) Justice Jackson, after a survey and criticism of the federal law of conspiracy declared (id. 457):

> "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evildoing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges. . . . And I think there should be no straining to uphold any conspiracy conviction where [as herein] the *purpose served by adding the conspiracy charge* seems *chiefly to get procedural advantages* to ease the way to conviction" (emphasis ours).

Herein, the "conspiracy" as to Viviano, Kurman, and Kramer was invented by the Court and never charged by the Grand Jury.

As noted by the Court in *United States* v. *Peoni,* 100 F.2d 401, 403 (2 Cir. 1938):

> "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it."

In *United States* v. *Andolschek,* 142 F.2d 503 (2 Cir. 1944) the Court aptly observed (id. at 507):

> "It is true that at times courts have spoken as though, if A. makes a criminal agreement with B., he becomes a party to any conspiracy into which B. may enter, or may have entered, with third persons. *That is of course an error;* the scope of the agreement actually made always measures the conspiracy, and the fact that B. engages in a conspiracy with others is as irrelevant as that he engages in any other crime." (emphasis ours)

In *United States* v. *Falcone,* 109 F.2d 579 (2 Cir. 1940), aff'd 311 U.S. 205 (1940), the Court also pertinently explained (id. at 581) [per L. Hand, J.]:

> "[The accused] must in some sense promote their venture himself, *make it his own,* have a stake in the outcome . . ." (Italics supplied).

Nothing indicates that Weiser was thus involved with the others.

In *Falcone, supra,* the Court continued at 581:

> ". . . today when so many prosecutors seek to sweep within the *drag-net of conspiracy* all those who have been associated in any degree whatever with the main offenders . . . there are *opportunities of great oppression* in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided" (emphasis ours.)

In short, the Petitioner herein was obliged to meet a conspiracy charge that he was confronted with for the first time at the trial (it not having appeared in the indictment); and then to reconcile incriminatory statements of non-testifying "co-conspirators" whom he could not cross-examine or even compel their attendance for testimony since they could invoke the Fifth Amendment. Moreover, there is no reason that Petitioner should have to rebut statements of non-testifying persons (*Bruton* v. *United States, supra,* and *Roberts* v. *Russell, supra*).

CONCLUSION

The petition for a writ of certiorari to the second circuit should be granted.

December 31, 1969

Respectfully Submitted:

Irving Anolik
Attorney for Petitioner

APPENDIX

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 181—September Term, 1969.

(Argued October 1, 1969 Decided November 13, 1969.)

Docket No. 33572

UNITED STATES OF AMERICA,

Appellee,

—against—

FREDERICK WEISER,

Defendant-Appellant.

Before:

FRIENDLY, SMITH and FEINBERG,

Circuit Judges.

IRVING ANOLIK, New York, N. Y., *for Defendant-Appellant.*

JOHN R. WING, Assistant United States Attorney, *for Appellee.*

FEINBERG, *Circuit Judge:*

Frederick Weiser, a former internal revenue agent, appeals from a judgment of conviction on various counts growing out of the alleged bribery of another internal revenue agent. After a six-day trial before Irving Ben

Cooper, *J.* and a jury in the United States District Court for the Southern District of New York, appellant was convicted of conspiring to bribe inspector Harold Wenig (Count 1), 18 U.S.C. §371; of bribing Wenig (Count 2), 18 U.S.C. §201(b); of aiding and abetting three other agents in bribing Wenig (Counts 4, 5 and 6), 18 U.S.C. §201(b); and of failing to report violations of the revenue laws which he knew the other agents were committing (Counts 19, 11 and 12), 26 U.S.C. §7214(a)(8).[1] Judge Cooper imposed concurrent sentences of 18 months imprisonment on each count. Appellant makes a number of arguments for reversal of his conviction. Finding none of them sufficiently persuasive, we affirm.

I.

The point appellant presses most insistently is that he was entrapped; this claim grows out of the unusual facts of the case, to which we turn. Weiser's indictment arose out of an investigation by the Internal Revenue Service into corruption on the part of its own agents. In the course of that undercover inquiry, inspector Wenig assumed the role of a dishonest inspector willing to sell confidential information to internal revenue agents under investigation. In the fall of 1966, defendant Weiser became aware that Sidney Romanoff, a co-worker who was under investigation, was obtaining confidential information from Wenig concerning his own case. At that time, Weiser knew that he himself had been under investigation because

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[1] Appellant was acquitted on four counts (3, 7, 8 and 9), which also charged on each bribe transaction the payment of a "gratuity," 18 U.S.C. §201(f).

a car wash owned by his wife and the wives of two other revenue agents was suspected of being a cover for illicitly received bribe monies. On November 2, 1966, Romanoff told Wenig that Weiser was interested in meeting him to obtain information concerning Weiser's case; it was Romanoff, not Wenig, who first mentioned Weiser. On December 5, Wenig told Romanoff that he had obtained some information for Weiser. Romanoff arranged a meeting on the next day, and told Wenig that Weiser was prepared to pay $100 for the information. As arranged, Wenig met Weiser and Romanoff at Roosevelt Field Shopping Center on Long Island. Romanoff introduced Weiser to Wenig and left them alone together. Weiser then gave Wenig $100 cash; Wenig showed him a Xerox copy of interview questions concerning the car wash investigation. They reviewed the questions and discussed answers designed to get Weiser through the anticipated interview. Weiser agreed to use the code name "Caruso" for contacting Wenig at his office. They met for a second time on December 13 to discuss "new information" which Wenig had discovered concerning alleged large cash expenditures by Weiser (for furniture, carpeting, basement improvements and a maid). Weiser assumed that this information was directed at proving wrongdoing on a "net worth" theory. He told Wenig that most of the items were incorrect, except for a $1,500 cash expenditure for furniture. Weiser said that the investigator would have a difficult time tracing the furniture, and discussed the possibility of claiming that his mother had given him the money on her deathbed. At this same meeting, Wenig mentioned another of Weiser's coworkers who was under investigation, Marvin Kramer. Weiser said that Kramer was a "good boy" and that Wenig

ought to help him. On December 15, Weiser called Wenig to tell him that Kramer wanted to get information. At a meeting the next afternoon, Weiser and Wenig discussed in Kramer's absence the information concerning Weiser which had been revealed at the last meeting. Weiser also told Wenig that Kramer had the money ready. Then, in the absence of Weiser, Kramer gave Wenig $100 in cash in exchange for confidential information concerning his case. Weiser later performed similar go-between services for agents Max Kurman and Cesare Viviano. Weiser mentioned them to Wenig, introduced them to him, and they paid Wenig $200 in cash each for information relating to their own cases. Weiser actually was interviewed by the Inspection Service in January 1967; he found the information provided by Wenig to be so useful that he paid him an additional unsolicited $50 in cash following the interview.

II.

Based upon these facts, appellant argues that he was entrapped as a matter of law. Entrapment occurs when the Government induces the commission of an offense and the defendant was not "ready and willing without persuasion" to commit it and was not merely "awaiting any propitious opportunity" to do so. See *United States* v. *Sherman,* 200 F.2d 880, 882-83 (2d Cir. 1952). The burden is on the accused to prove the first element of the defense, which "goes simply to the Government's initiation of the crime and not to the degree of pressure exerted." See *United States* v. *Riley,* 363 F.2d 955, 958 (2d Cir. 1966). The burden of proving the second element—often termed

propensity—is on the Government. See, e.g., *United States* v. *Smalls*, 363 F.2d 417, 419 (2d Cir. 1966), cert. denied. 385 U.S. 1027 (1967). Appellant does not argue that the jury was improperly charged on these distinctions. Instead he says that what happened to him was a "classic illustration of premeditated entrapment . . . as a matter of law" and that the trial judge should have so ruled. We do not agree. There is evidence in the record that appellant, not Wenig, made the initial suggestion that he meet with Wenig to find out what "information" the latter might have about appellant. Moreover, even if the original solicitation had come from the Government, Weiser's propensity—indeed eagerness—to commit various crimes was clear. It was Weiser, after all, who clearly initiated the $50 bribe which is the subject of Count 2 of the indictment, and the record supports a finding that Weiser's efforts as go-between were his own idea and, in any event, willingly undertaken. Under those circumstances, the argument that he was entrapped as a matter of law is simply contrary to the record; the issue was one for the jury to determine. Apparently, what appellant is really suggesting is that it was improper or immoral for the Government to allow defendant to pay Wenig, whom he labels a "Judas Goat," for "phony" information. The immorality escapes us. Whether Weiser was truly being investigated by the Service is not the point, although apparently he was. The issue is whether Weiser was himself willing to bribe and to help others to bribe an internal revenue agent if the opportunity arose and, as to this, the jury verdict is conclusive.

Appellant also claims that unfortunate personal experiences were then causing him so much emotional strain that

he could not resist an offer to relieve his tension, but this goes to the defense of mental illness discussed below. Cf. *United States* v. *Henry,* slip op. 79 (2d Cir., Oct. 10, 1969). As a final and peripheral argument on the entrapment issue, appellant argues that the court improperly prevented him, on his cross-examination of Wenig, from finding out the name of the "acquaintance" who introduced Wenig to co-conspirator Romanoff. However, the judge did allow inquiry into whether the person was a government agent and into Wenig's "method of operation" generally, the obviously relevant facts for defendant's entrapment argument.

III.

Appellant also argues that compelling him to be examined by a government psychiatrist violated his fifth amendment rights. Early in the trial, Weiser's counsel revealed that defendant would raise mental incapacity as a defense and said that his treating psychiatrist would testify on the issue. A few days later, Judge Cooper granted the Government's request that Weiser be examined by its own psychiatric expert; the examination took place the next day. During the trial, Dr. Edward H. Einhorn, the defendan't psychiatrist, related in detail Weiser's severe personal and family problems at the time of the crimes for which he was tried, as did Weiser himself. Dr. Einhorn gave as his opinion that Weiser could not resist the temptation to commit the crimes, i.e., that he lacked the requisite capacity, under the test of *United States* v. *Freeman,* 357 F. 2d 606, 622 (2d Cir. 1966), to "conform his conduct to the requirements of law." The government expert, Dr.

David Abrahamsen, gave a contrary professional opinion. In returning a guilty verdict, the jury obviously accepted the latter view, an option clearly open to them on the conflicting evidence.

Appellant argues that we should reverse the finding of criminal responsibility, but this borders on the frivolous. The real questions concern the court's order requiring Weiser to submit to a psychiatric examination and allowing Dr. Abrahamsen to testify as to the results of it.

Absent any constitutional infirmity, the district court had the power to order defendant to submit to the examination. In *United States* v. *Driscoll,* 399 F.2d 135, 139 (2d Cir. 1968), we said that "a strong case can be made for the existence" of such power, citing, *inter alia, United States* v. *Albright,* 388 F.2d 719 (4th Cir. 1968), and *Alexander* v. *United States,* 380 F.2d 33 (8th Cir. 1967). In *United States* v. *Baird,* 414 F.2d 700, 710 (2d Cir. 1969), that estimate was confirmed, and the district court's power to order a psychiatric examination was justified by the responsibility of the federal courts "to supervise the administration of criminal justice in order to ensure fundamental fairness." On the facts before us, we adhere to that reasoning and agree with the court in *Alexander* v. *United States, supra,* 380 F.2d at 39, that "It would violate judicial common sense to permit a defendant to invoke the defense of insanity and foreclose the Government from the benefit of a mental examination to meet this issue."

Appellant contends that his fifth amendment rights were violated because of the psychiatric examination ordered by the court. In *United States* v. *Baird, supra,* 414 F.2d at

708, we held that where, under circumstances similar to those presented here,

> the defendant puts in evidence the opinion testimony of his expert, the Government has the right to have its expert examine the accused and to put in evidence his opinion testimony in rebuttal, and that the exercise of such right by the Government does not infringe the defendant's right against self-incrimination.

In *Baird*, we did emphasize 414 F.2d at 707-08, that the defendant there had not been examined by the experts for *treatment* prior to commission of the alleged criminal act. Appellant argues that *Baird* is therefore distinguishable since he did go to his psychiatrist for treatment. However, this case could technically be described as similar to *Baird*, since Weiser first visited his psychiatrist after he paid the first bribe to Wenig and at a time when he knew he was under investigation for something. But, in any event, we believe that the distinction is without substance; defendant's fifth amendment rights would be the same whether he saw a psychiatrist before or after he committed the crime. The point is not when defendant consulted his expert, but whether—and on what theory—the testimony of his expert is offered at trial.

Baird rested on a theory of estoppel which was made additionally attractive, no doubt, because the defendant did not testify in that case. Thus, we pointed out that defendant there was able to get the effective benefit of testifying without doing so by having his experts testify at length as to what he said to them. Defendant in that case justified the admissibility of such evidence on the theory that such

out-of-court declarations were offered "as verbal acts on which the doctors' opinions are based," *id.* at 708, not for their truth; accordingly, we said that the Government had the right to use "the same evidence-admissibility theory" and defendant was "estopped from making an effective objection." *Id.* at 709. In the present case, defendant did testify, but the same theory would still apply to his out-of-court statements made to his own or the Government's expert. Moreover, neither in *Baird* nor in this case was the Government's expert allowed to testify about any statement of defendant relating to his guilt or innocence of the offense charged. Accordingly, under the reasoning of *Baird,* the fifth amendment is not violated by allowing a psychiatrist to testify on the basis of an examination of defendant to which the latter was ordered to submit.

IV.

Appellant's remaining claims require less extended comment. Objection is made to introduction into evidence of tapes and transcripts of various conversations between Wenig and Weiser and between Wenig and others obtained by secret electronic devices. That some portions of the tapes were inaudible does not necessarily render the entire conversation inadmissible; that question was for the trial judge to determine in his discretion. *United States* v. *Kaufer,* 387 F.2d 17, 19 (2d Cir. 1967). Nor did the fourth or sixth amendments require their exclusion. *Lopez* v. *United States,* 373 U.S. 427, 437-40 (1963); *Hoffa* v. *United States,* 385 U.S. 293, 309-10 (1966). The great bulk of Wenig's recorded conversations were with defendant, but a few were with Romanoff, Kramer, Kurman and Viviano (none of whom testified)

both in and out of defendant's presence. Appellant claims that these should have been excluded under *Bruton* v. *United States,* 391 U.S. 123 (1968), and *Roberts* v. *Russell,* 392 U.S. 293 (1968). However, as to each there was a sufficient showing of a joint venture to which Weiser was a party so that the statements were all admissible as declarations in furtherance thereof. *Bruton,* therefore, is not controlling. See 391 U.S. 128 n. 3. Finally, the absence of a formal conspiracy charge against Kramer, Kurman and Viviano is not dispositive. *United States* v. *Granello,* 365 F.2d 990, 995 (2d Cir. 1966), cert. denied, 386 U.S. 1019 (1967).

Two other arguments require brief mention. At the end of his summation, the prosecutor referred to Counts 10, 11 and 12 of the indictment:

> There is a further violation that you have to consider, ladies and gentlemen, and that is Weiser's failure to report the illegal conduct he was aware of between Kramer, Kurman, Viviano and Wenig, and the regulations about that, so that the government can try and make sure that they have clean people working for them, people of integrity. So you don't have scandals, so you don't have a water commissioner who is arrested for taking bribes, so you don't have sanitation men out in Queens who are paid off to clean someone's streets and not other streets, in order to have a decent system and a fair system and a good government. There is a reason for those things.

Appellant claims that this was an unfair reference to the case of James L. Marcus, then in the headlines, and to reports of garbage collectors who during the trial had apparently

refused to plow a snow-covered street without payment of a bribe. While the remarks objected to might have been better left unsaid, they hardly denied defendant a fair trial. The prosecutor did not call Weiser another Marcus; he said rather that the statute requiring one agent to report wrongdoing by another, 26 U.S.C. §7214(a)(8), was designed to avoid scandals like the Marcus incident.

Finally, appellant's reply brief argues that that statute is unconstitutional because it required Weiser to report activities "which conceivably might have involved himself in a criminal charge," citing *Leary* v. *United States,* 395 U.S. 6 (1969); *Marchetti* v. *United States,* 390 U.S. 39 (1968); and *United States* v. *McCarthy,* 298 F.Supp. 561 (S.D.N.Y. 1969). Putting to one side the question whether we should decline to consider this argument either because it was not made to the trial court,[2] see *United States* v. *Indiviglio,* 352 F.2d 276 (2d Cir. 1965), cert. denied, 383 U.S. 907 (1966), or because defendant received concurrent sentences on the other five counts, cf. *Benton* v. *Maryland,* 395 U.S. 784 (1969), and *United States ex rel. Weems* v. *Follette,* 414 F.2d 417 (2d Cir. 1969), the cases cited are all distinguishable. We do not believe that they require striking down a statute which does not require a report of the agent's own derelictions, but only those of others.

No other argument of appellant requires discussion. Judgment affirmed.

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[2] Judge Cooper raised this point himself when the requests to charge were being discussed, effectively inviting argument on it; however, defense counsel did not take advantage of the opportunity.

Order of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of November one thousand nine hundred and sixty-nine.

Present:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

FREDERICK WEISER,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Order Denying Rehearing

33572

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

FREDERICK WEISER,

Defendant-Appellant.

A petition for a rehearing together with a motion in the alternative for a stay of mandate and continuation at liberty pending certiorari having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition for a rehearing be and it hereby is denied;

And that the petition for a stay of mandate and continuance of liberty on defendant's recognizance be and it hereby is granted pursuant to the usual conditions of FRAP 41(b).

HENRY J. FRIENDLY
J. JOSEPH SMITH
WILFRED FEINBERG
Circuit Judges

December 10, 1969